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No. 06-1505

IN THE
SUPREME COURT OF THE UNITED STATES

Clifford B. Meacham *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

AARP and the National Employment Lawyers Association (NELA) move for leave to file the accompanying brief *amici curiae* in support of the Petitioners whose case is before the Court on a Petition for a Writ of Certiorari from the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Pursuant to Supreme Court Rule 37.2(b), through counsel *amici* sought the consents of the parties to the filing of this brief. Counsel for the Petitioners gave consent, but counsel for the Respondents withheld consent.

INTEREST OF *AMICI CURIAE*

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Almost half of AARP's more than 38 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, and various state laws. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a current membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the work place. NELA advocates for

employee rights and work place fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

Both AARP and NELA have filed numerous *amicus curiae* briefs before this Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws ensuring full enforcement of the laws and full protection of the rights of workers. In addition, both organizations filed *amicus curiae* briefs with this Court in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005), and with the court below in this case concerning the applicability and appropriate standard for disparate impact claims under the ADEA.

REASONS FOR GRANTING THE MOTION

Amici are concerned that lower courts, as evidenced by the decision by the Second Circuit in this case, are confused by the question of which party bears the burden of proof in a disparate impact case under the ADEA in which the "reasonable factor other than age" provision plays a central role. In addition, despite this Court's holding in *Smith* that the ADEA authorizes claims of disparate impact, the Court did not expound upon the elements of such a claim, particularly the meaning of "reasonable." Unless this Court provides guidance on the burden of proof and defines "reasonable" as a meaningful standard, it is unlikely that any plaintiff will be able to state a cognizable disparate impact claim under the ADEA. As a result, employers will be able to discriminate at will based on factors that, as in this case," adversely impact older workers with "startingly skewed results," *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d 56, 75 (2d Cir. 2004), even if the factor has only a marginal relationship to a business purpose.

Given that during the first decade of this century, the number of workers age 55 and older is expected to increase by

46 percent from 18.2 million to 26.6 million,[1] this issue will continue to grow in importance. *Amici* urge the Court to grant the Petition to provide courts with clear and definitive guidance concerning the standard and burden of proof for disparate impact claims under the ADEA.

June 14, 2007

Respectfully Submitted,

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[1] Jerry W. Hedge, Walter C. Borman, Steven E. Lammlein, THE AGING WORKFORCE, 9 (American Psychological Assoc. 2006).

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS[2]

INTERESTS OF *AMICUS CURIAE*[3]

SUMMARY OF THE ARGUMENT

In *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005), this Court held that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, authorizes disparate impact claims. *Smith* also established that the standard for determining the lawfulness of a practice that disproportionately affects older workers is the "reasonable factor other than age" provision found in § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1).[4] Significantly, however, the

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[2] In compliance with Rule 37.6 of this Court, *amici curiae* AARP and NELA state that no counsel for any party authored this brief in whole or in part, and that no party or entity other than these *amici curiae*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

[3] *Amici Curiae* have described their interest in the accompanying Motion of AARP and National Employment Lawyers Association (NELA) for Leave to File a Brief *Amici Curiae* which precedes this Brief, and does not repeat the same in this section of the Brief.

[4] Section 4(f)(1) of the ADEA states:

"It shall not be unlawful for an employer, employment agency, or labor organization - -

> (1) to take any action otherwise prohibited under subsection (a), (b), (c, or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the

majority opinion in *Smith* did not state which party has the burden of proof with respect to whether a practice is based on a "reasonable factor other than age."

The question of which party bears the burden of proof regarding the ADEA's "reasonable factor other than age" provision (hereinafter RFOA) has never been definitively resolved. Although Congress, the Equal Employment Opportunity Commission (EEOC), and numerous federal courts have weighed in on the issue, there is no agreement. In *Western Air Lines, Inc. v. Criswell*, this Court granted *certiorari* to consider the burden of proof applicable to the RFOA provision, but declined to reach the issue. 472 U.S. 400, 408 n.10 (1985).

The *Smith* Court also failed to provide a clear definition of "reasonable" when a factor other than age is used as a defense to a disparate impact claim under the ADEA. While the Court did provide some guidance establishing that "reasonable" is not a superficial standard that can be readily satisfied by any explanation proffered by an employer, it is clear from the decision of the Second Circuit in this case, as well as other lower court decisions attempting to interpret the *Smith* decision when deciding disparate impact claims under the ADEA, that more definitive guidance is needed.

Prior to *Smith*, the RFOA provision was not the subject of much litigation. However, when this Court ruled in *Smith* that the disparate impact theory is available under the ADEA and that the RFOA provision plays a "principal role," which is to "preclud[e] liability if the adverse impact was attributable to a nonage factor that was 'reasonable,'" 544 U.S. at 239, it took on heightened significance. Accordingly, it is imperative that this Court grant the petition to resolve the uncertainties surrounding the "reasonable factor other than age" provision and to provide much-needed guidance to the lower courts.

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differentiation is based on reasonable factors other than age."

29 U.S.C. § 623(f)(1) (2000).

ARGUMENT

I. THIS COURT SHOULD ELIMINATE THE CONFUSION SURROUNDING THE QUESTION OF WHICH PARTY MUST PROVE OR DISPROVE THE "REASONABLENESS" OF AN EMPLOYER PRACTICE THAT ADVERSELY IMPACTS OLDER WORKERS.

The question of which party bears the burden of proof regarding the ADEA's "reasonable factor other than age" provision is fraught with confusion. The court below, lacking clear guidance from this Court as to who bears the burden of proof with respect to the "reasonableness" of the nonage factor that adversely impacted the protected age group, was left to resort to what it considered to be "[t]he best reading of the text of the ADEA - in light of *City of Jackson* and *Wards Cove* [*Packing Co. v. Antonio*, 490 U.S. 642 (1989)] . . . ." *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134, 141 (2d Cir. 2006). After conceding that there "is some force" to the argument that the RFOA provision is an affirmative defense, the Second Circuit nevertheless surmised that "the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable." *Id.* While the Second Circuit's conjecture about who must prove or disprove "reasonableness" is in accord with the U.S. Court of Appeals for the Tenth Circuit's decision in *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006), it conflicts with guidance from this Court; Congress; other federal circuits; and the Equal Employment Opportunity Commission (EEOC).

In *Western Air Lines, Inc. v. Criswell*, the Court determined that it was unnecessary to decide one of the issues on which it had granted certiorari - whether the RFOA provision constitutes an affirmative defense. 472 U.S. 400, 408 n.10 (1985). However, earlier in the same term, the Court had referred in passing to the RFOA provision as an affirmative defense. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (stating that the ADEA contains "five affirmative defenses). And, most recently, Justice Scalia referred to the RFOA provision as a "defense" in *Smith*. 544 U.S. at 246

(Scalia, J., concurring) ("... the RFOA defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA.") (emphasis in original). Given the RFOA now has a "principal role" to play in analyzing disparate impact claims under the ADEA, it is imperative that this Court offer more than subtle "hints" about the nature of the RFOA provision and provide a definitive answer to the question of who bears the burden of proving or disproving "reasonableness."

Even before this Court elevated the importance of the RFOA provision, the courts were split on the question of whether the RFOA language constitutes an affirmative defense.[2/] The division persists now with much greater implications because of the increased significance of the RFOA provision. In addition to the court below, the Tenth Circuit, in a post-*Smith* decision, held that "[T]o prevail on an ADEA disparate impact claim, an employee must ultimately persuade the factifinder that the employer's asserted basis for the neutral policy is *unreasonable*." *Pippin*, 440 F.3d at 1200 (emphasis in original). However, in sharp contrast, in *Williams v. Sprint/United Management Co.*, the court ruled that "Plaintiffs have no obligation to plead anything at all with respect to the RFOA defense - *a defense that is defendant's burden to plead and prove.*" 2005 WL 1801605 at *3 (D. Kan. July 29, 2005) (emphasis added).

[2/] *Compare Equal Employment Opportunity Comm'n v. Westinghouse Elec. Corp.*, 725 F.2d 211, 222-23 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590-91 (5th Cir. 1978); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979); and *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1415-16 (11th Cir. 1986), *cert. denied*, 479 U.S. 1090 (1987) (cases holding that the RFOA is not an affirmative defense) *with EEOC v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 648 (9th Cir. 1992) (holding that the RFOA is an affirmative defense but rejecting it as a valid defense to union hiring hall policy that required retirees to cease receiving pensions, since pension receipt was conditioned on age).

Litigants struggling to determine who bears the burden of proving or disproving "reasonableness" must also take into consideration counsel from Congress. The legislative history of the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990), provides compelling support for the conclusion that the RFOA is an affirmative defense. In response to the Supreme Court construing the former language in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2) as placing the burden of proof on plaintiffs,[9] Congress copied the language from § 4(f)(1) to ensure that the new § 4(f)(2) would be interpreted as an affirmative defense:

> The Committee intends that the amendments made by the bill to section 4(f)(2) . . . should be interpreted in a manner similar to the way the EEOC and most courts have interpreted the ADEA's other affirmative defenses, section 4(f)(1). Accordingly, the language of section 4(f) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . *to take any action otherwise prohibited*" by the ADEA (emphasis added) should be applied to the revised section 4(f)(2) . . . The Committee [ ] endorses the position of the EEOC that the "reasonable factors other than age" exception included in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (*See* 29 C.F.R. § 1625.7), and expresses approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception.

1 LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, at 253-54 (1990).

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[9] *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989) (construing the language "It shall not be unlawful for an employer . . . to observe the terms of . . . a bona fide employee benefit plan . . . .").

The question of which party bears the burden of proving or disproving reasonableness is also addressed by the EEOC's regulations governing the RFOA provision. While this Court rejected the business necessity component in the EEOC's regulations at 29 C.F.R. § 1625.7(e), *Smith*, 544 U.S. at 243, it did not speak to any of the other provisions of the regulations which it viewed as authorizing a disparate impact claim. The original Department of Labor interpretations stated both the BFOQ and RFOA defenses in ADEA § 4(f)(1) "must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer. . . ." 29 C.F.R. § 860.102(b), 860.103(e), 33 Fed. Reg. 9173 (1968). This contemporaneous interpretation is entitled to great weight. *Dothard v. Rawlinson*, 433 U.S. 321, 334 n.19 (1977) (an agency's 1965 interpretation of statutory language, consistently adhered to, should be given weight). When the EEOC assumed responsibility for the enforcement of the ADEA, it continued to view the RFOA exception as an affirmative defense. EEOC regulations state that "the employer bears the burden of showing that the 'reasonable factor other than age' exists factually," 29 C.F.R. § 1625.7(e)(2004), which would impose a burden of proof.

Finally, the most common reason given in support of concluding that plaintiffs bear the burden of proving an employer's practice is "unreasonable' is that in *Smith*, this Court stated that because the ADEA was not amended by the Civil Rights Act of 1991, 105 Stat. 1071, "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240. However, rather than helping to sort out the confusion surrounding who bears the burden of proof in disparate impact cases under the ADEA, this factor only muddies the issue further.

Smith stated that *Wards Cove* only applies to language in the ADEA that is "identical" to language in Title II. *Id.* However, there is nothing even remotely similar to the ADEA's RFOA provision in Title VII, let alone "identical." Accordingly, this Court's directive that *Wards Cove* should be applied to interpret language in the ADEA that is identical to language in Title VII is not at all helpful in determining which

party must prove or disprove "reasonableness." Indeed, this Court suggested as much itself when it stated, "*[A] difference in the text of the statute* such as the RFOA provision, may warrant addressing disparate-impact claims in the two statutes [the ADEA and Title VII] differently. . . ." *Smith*, 544 U.S. at 236 n.7 (emphasis in original).

Instead, the language and context of the ADEA strongly support characterizing the RFOA as an affirmative defense. The RFOA provision begins with a specific proviso: "to take any action otherwise prohibited." 29 U.S.C. § 623(f)(1). This prefatory phrase means that the RFOA provision does not come into play until a violation of an ADEA prohibition has been established. When a party seeks to have a violation excused by asserting an exception to liability, that party typically bears the burden of proving that its conduct falls within the exception. *See United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967) (asserting as a general rule that the party claiming the benefits of an exception bears the burden of proof).

As discussed above, Congress views the prefatory language "to take any action otherwise prohibited" as creating an affirmative defense. Based on its understanding of this proviso, Congress added this precise language to ADEA § 4(f)(2) in the OWBPA, to eliminate any doubt that it is an affirmative defense for which the employer bears the burden of proof.

The placement of a provision within the context of the statute provides particular insight into its meaning. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). The RFOA provision of the ADEA is sandwiched between the BFOQ provision and the foreign workplace provision. The Court has repeatedly held that the BFOQ provision is an affirmative defense. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n.24 (1985) (citing 29 C.F.R. § 1625.6(b) (1984), which lists three prongs a defendant must satisfy for the BFOQ defense); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (listing the BFOQ argument as an affirmative defense). The foreign workplace provision has also been

recognized as an affirmative defense.[7] The contiguous placement of the RFOA provision with the ADEA's other affirmative defenses, strongly suggests that it too is an affirmative defense.

Finally, requiring plaintiffs who have already succeeded in showing the existence of a clearly discriminatory policy to carry the additional burden of proving the absence of a "reasonable factor other than age" would be extremely detrimental to older workers and would significantly weaken the protections against age-based discrimination found in the ADEA. It would allow employers to merely articulate "other factors" without being obligated to prove them. Where age discrimination has been shown, the RFOA defense must constitute more than a mere denial of such discrimination. Otherwise, employers may discriminate against older workers practically at will.

II. THE SECOND CIRCUIT'S DECISION THAT SUBJECTIVE DECISIONMAKING IS "UNQUESTIONABLY REASONABLE" IS INCOMPATIBLE WITH *WATSON v. FORT WORTH BANK & TRUST.*

In *Smith*, a plurality of this Court held that the RFOA provision is "not . . . a safe harbor from liability." 544 U.S. at 238. Rather, the RFOA provision precludes liability only if the "adverse impact was attributable to a nonage factor that was 'reasonable.'" *Id.* at 239. This Court clearly demonstrated its view that not every employer practice or policy can be "reasonable" by juxtaposing the RFOA provision with the Equal Pay Act's provision that precludes liability "if a pay differential was based on 'on any other factor' – reasonable or unreasonable," 544 U.S. at 239 n.11, and by stating that "[t]he fact that Congress provided that employers could only use

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[7] *See Mahoney v. Radio Free Europe/Radio Liberty, Inc.*, 818 F. Supp. 1,4 (D.D.C. 1992), *rev'd on other grounds*, 47 F.3d 447 (D.C. Cir. 1995) (construing foreign employee provision as an affirmative defense).

reasonable factors in defending a suit under the ADEA is . . . instructive." *Id.* (emphasis in original). Unfortunately, however, this Court did not expound on the meaning of the term "reasonable" other than by stating that "the scope of disparate-impact liability under the ADEA is narrower than under Title VII." 544 U.S. at 240. This lack of guidance opens the door for lower courts to treat the RFOA provision as a free pass for employers to justify conduct that adversely impacts older workers.

Indeed, that is exactly what happened in the court below as the Second Circuit sanctioned the defendant's use of subjective criteria fraught with managerial bias as "reasonable." Prior to *Smith*, the Second Circuit in this case recognized that the subjectivity of the factors the defendant used to make termination decisions - "criticality" and "flexibility" - made them vulnerable to age-related bias. *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d at 75. Moreover, "the subjectivity disproportionately impacted older employees," and "the employer observed that the disproportion was gross and obvious. . ." *Id.* In the face of such "startlingly skewed results," *id.* n.8, the Second Circuit ruled that the defendant's "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" *id.*, to make termination decisions had a disparate impact based on age in violation of the ADEA. After *Smith*, the Second Circuit executed an about face and held that while "[a]ny system that makes employment decisions in part on such subjective grounds as flexibility or criticality may result in outcomes that disproportionately impact older workers; . . . such a system . . . will usually be reasonable." *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d at 146. This laissez-faire reading of the RFOA provision erects an insurmountable hurdle to disparate impact challenges to subjective decisionmaking under the ADEA and conflicts with this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

In *Watson v. Fort Worth Bank & Trust*, the Court noted that the disparate impact theory is necessary to "adequately police . . . the problem of subconscious stereotypes and

prejudices." 487 U.S. 977, 990 (1988).[9] Given that the Court has also stated that the "essence of age discrimination" is older workers being harmed by "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), the Second Circuit's ruling that employment decisions based on subjective criteria that were admittedly vulnerable to "managerial bias" renders the *Smith* decision meaningless and effectively insulates from challenge age discrimination that results from unconscious prejudice and stereotyping. "Allowing an employer to escape liability simply by articulating vague, inoffensive-sounding subjective criteria would disserve [the ADEA's] goal of eradicating discrimination in employment . . . Such a rule would encourage employers to abandon attempts to construct selection mechanisms subject to neutral application for the shelter of vague generalities." *Watson*, 487 U.S. at 1009-1010 (J. Blackmun, concurring) (footnote omitted).

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[9] *See also Alexander v. Choate*, 469 U.S. 287, 292-99 (1985) (discussing the *appropriateness* of disparate impact analysis under § 504 of the Rehabilitation Act 29 U.S.C. § 791 *et seq.*, since discrimination against the disabled often results from thoughtlessness not animus).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

June 14, 2007

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